



0000049669

MAY 14 2003

ORIGINAL

REHEARING

RECEIVED

1 FENNEMORE CRAIG
Norman D. James (No. 006901) Arizona Corporation Commission
2 Jay L. Shapiro (No. 014650) DOCKETED
3003 N. Central Ave.
3 Suite 2600
Phoenix, Arizona 85012 APR 24 2003
4 Attorneys for Arizona-American
Water Company, Inc.

2003 APR 24 P 4: 06

AZ CORP COMMISSION
DOCUMENT CONTROL

DOCKETED BY

CA

BEFORE THE ARIZONA CORPORATION COMMISSION

8 IN THE MATTER OF ARIZONA-
9 AMERICAN WATER COMPANY –
10 AGUA FRIA DIVISION SEWER HOOK-
UP FEE TARIFF REVISIONS

DOCKET NO. SW-01303A-02-0628

11 IN THE MATTER OF ARIZONA-
12 AMERICAN WATER COMPANY –
13 AGUA FRIA DISTRICT – WATER
FACILITIES HOOK-UP FEE TARIFF
14 REVISIONS

DOCKET NO. W-01303A-02-0629

ARIZONA-AMERICAN WATER
COMPANY'S MOTION FOR
RECONSIDERATION

15 Pursuant to A.R.S. § 40-253, Arizona-American Water Company (hereinafter
16 "Arizona-American" or "Company") hereby requests that the Arizona Corporation
17 Commission ("Commission") reconsider Decision No. 65800, filed on April 9, 2003 (the
18 "Decision"). In the Decision, the Commission granted the Utilities Division's ("Staff")
19 motion to dismiss the Company's applications to amend its existing hook-up fee tariffs so
20 that these fees apply uniformly throughout the Agua Fria water and wastewater districts.
21 Reconsideration is warranted because the Decision constitutes a significant departure from
22 established Commission precedent that is not required under Arizona law. Accordingly,
23 upon reconsideration, the Commission should deny Staff's motion to dismiss and, because
24 there is no dispute over the reasonableness of the hook-up fees, direct the Hearing
25 Division to issue a new recommended opinion and order approving the relief originally
26 requested by Arizona-American.

1 **I. BACKGROUND**

2 In Decision No. 64307 (Dec. 28, 2001), the Commission authorized Arizona-
3 American's predecessor, Citizens Communications, to collect hook-up fees as a condition
4 to extending service within a portion of its certificated service area west of Phoenix.
5 Decision at 1. These hook-up fees are treated as contributions in aid of construction
6 ("CIAC"). They are maintained in a separate interest-bearing account and can be used
7 only for the construction of utility plant. As CIAC, the hook-up fees are contributed
8 capital. CIAC does not constitute revenue and has no impact on a utility's operating
9 income. Therefore, as the Commission has previously recognized, hook-up fees have no
10 impact on a utility's return on its "fair value" rate base.

11 In this docket, as Staff has recognized, the Company merely seeks to extend the
12 previously approved hook-up fee tariff in a non-discriminatory fashion throughout the
13 remainder of its certificated area:

14 Arizona-American filed revised tariffs for their Agua Fria
15 District water and wastewater facilities hook-up fees on
16 August 16, 2002. **The facilities hook-up fees are identical to
17 the ones already approved by Decision No. 64307 dated
18 December 28, 2001 for the "Whitestone" Certificate of
19 Convenience and Necessity (CC&N). The revisions in these
20 applications will extend the same tariffs to other areas of
21 the Agua Fria District in Maricopa County.¹**

19 The fees were developed based on typical construction costs
20 for backbone plant in the Agua Fria District. The water hook-
21 up fees are based on meter size. The wastewater hook-up fees
22 are based on equivalent residential units (ERU). The fees will
23 recover a portion of the costs associated with the construction
24 of the backbone plant.

22 The hook-up fees for water can be used for offsite facilities
23 such as treatment facilities, wells, transmission lines, storage
24 tanks pressure tanks, booster pumps and related appurtenances

25 ¹ As a point of clarification, there is no separate "Whitestone CC&N." In Decision No. 64307, the
26 Commission approved the extension of the CC&N for the Agua Fria water and wastewater districts to
include the 8,800 acre Whitestone project. The subject hook-up fee tariff was approved at the same time,
without a "fair value" finding, but only for the Whitestone area.

1 necessary for proper operation which provide regional or
2 system wide benefits.

3 The hook-up fees for wastewater can be used for treatment
4 facilities, effluent disposal equipment, sludge disposal
5 equipment, lift stations, force mains, collection mains and
6 appurtenances necessary for proper operation which provide
7 regional or system wide benefits.

8 Engineering has reviewed the proposed revisions and finds
9 them acceptable as submitted by AZ-American.

10 Staff Engineering Memorandum, December 20, 2002 (emphasis supplied). Thus, there is
11 no dispute that the hook-up fees themselves are reasonable.

12 Nevertheless, in the Decision, the Commission held that, as a matter of law, hook-
13 up fees may only be approved in the context of a general rate case in which the "fair
14 value" of the utility's plant and property is determined. The Commission's holding was
15 based on *US West Communications, Inc. v. Ariz. Corp. Comm.*, 201 Ariz. 242, 34 P.2d 351
(2001) (*US West II*), which, according to the Decision, established a new precedent
16 applicable to ratemaking in a monopolistic (as opposed to competitive) setting. The
17 Commission explained:

18 Although we recognize that this ruling may represent a
19 departure from prior decisions granting approval of hook-up
20 fee tariffs outside the context of a rate case, we believe that it
21 is necessary to comply with the precedent established by the
22 Arizona Supreme Court in *US West II*. In that case, the Court
23 stated that "[u]nambiguous constitutional language" must be
24 given its "plain meaning and effect" and a "determination of
25 fair value is necessary with respect to a public service
26 corporation." *US West II*, 201 Ariz. at 245. Therefore, the
27 Commission is required to make a fair value finding prior to
28 approving the requested hook-up fees. Accordingly, Arizona-
29 American's proposed hook-up fee tariffs should be evaluated
30 in the Company's pending rate case.

31 Decision at 4 (finding of fact 8). The Company respectfully submits that *US West II* did
32 not effect a change in Arizona law, requiring the Commission to override its prior
33 decisions and effectively treat CIAC as revenue.

1 **II. COMMISSION PRECEDENT SUPPORTS APPROVAL OF CIAC HOOK-**
2 **UP FEES WITHOUT A FINDING OF FAIR VALUE**

3 As the Commission expressly noted in the Decision, the position adopted conflicts
4 with established Commission policy and prior decisions. For example, the Commission
5 recently held that approval of hook-up fees treated as CIAC does not constitute a rate
6 increase under Arizona law. For example, in Decision No. 63259 (Dec. 14, 2000), the
7 Commission approved a Facilities Construction Advance Tariff for H2O, Inc. without a
8 “fair value” finding, expressly stating that this finding was not necessary. Similarly, in
9 Decision No. 62284 (June 16, 2000), the Commission approved an off-site facilities hook-
10 up fee for Johnson Utilities Company, L.L.C. outside of a rate case and without a “fair
11 value” finding. In this docket, Arizona-American sought only to extend the applicability
12 of its existing hook-up fee tariff throughout its entire CC&N. That hook-up fee tariff had
13 previously been approved without any “fair value” finding. *In re Citizens*
14 *Communications Company*, Decision No. 64307 (Dec. 28, 2001).

15 These decisions are hardly remarkable. The Commission has approved similar
16 hook-up fees for numerous public service corporations without making any “fair value”
17 findings. *See* Staff Responses to Arizona-American’s First Set of Data Requests (copy
18 attached hereto at Tab A). The Commission has long recognized that certain amounts
19 collected by utilities have no impact on revenue or operating income, and therefore can be
20 adjusted without a “fair value” finding.

21 The Commission’s rules, for instance, authorize a utility to “collect from its
22 customers a proportionate share of any privilege, sale or use tax.” A.A.C. R14-2-
23 409(D)(5). If sales or use taxes are increased, the utility is not required to file a general
24 rate application and obtain a fair value determination before collecting the additional taxes
25 from its customers. Very simply, sales and use taxes, although collected from customers,
26 are not treated as revenue for ratemaking purposes and do not affect the utility’s operating

1 income and return on rate base. Approval of a tariff authorizing a utility to collect hook-
2 up fees treated as CIAC for ratemaking purposes is no different.

3 In short, it is well established that CIAC does not constitute revenue, has no impact
4 on a utility's revenue and operating income, and ultimately has no impact on a utility's
5 return on its "fair value" rate base. Plant financed by CIAC is excluded from a utility's
6 rate base. *E.g., Cogent Public Service v. Ariz. Corp. Comm.*, 142 Ariz. 52, 55-56, 688
7 P.2d 698, 701-02 (App. 1984) (holding that CIAC provided under the terms of a service
8 connection tariff is excluded from rate base). Accordingly, the Commission has routinely
9 approved these sorts of charges outside a general rate case and without a "fair value"
10 determination. *US West II* does not provide any justification for ignoring prior
11 Commission decisions, as discussed below.

12 **III. US WEST II DOES NOT OVERRULE THIS COMMISSION PRECEDENT**

13 The Decision, like Staff's motion to dismiss, was predicated on the finding that *US*
14 *West II* requires that the Commission determine the fair value of the utility's property prior
15 to allowing a utility to collect hook-up fees treated as CIAC. However, as Chairman
16 Spitzer correctly pointed out during the Commission's deliberations, *US West II* is silent
17 on this subject. *US West II* did not involve a dispute over the term "rate," and the
18 Supreme Court did not hold that CIAC constitutes a rate, or that it should be treated as
19 revenue. Instead, *US West II* involved the issue of whether the Commission must find and
20 use the fair value of a utility's property to set rates in a **competitive** market setting. *US*
21 *West II*, 201 Ariz. at 244-46, 34 P.2d at 353-55. The court affirmed that in a monopolistic
22 setting, prior court decisions such as *Simms v. Round Valley Light & Power Co.*, 80 Ariz.
23 145, 294 P.2d 378 (1956), continue to apply.

24 Thus, in the context of setting rates for non-competitive water and wastewater
25 utilities like Arizona-American, *US West II* merely affirmed the past 90 years of reported
26 court decisions. 201 Ariz. at 245-46, 34 P.3d at 355-56 ("We still believe that when a

monopoly exists, the rate-of-return method is proper.”). *US West II* does not require that the Commission treat hook-up fees as a rate, or compel the Commission to determine a utility’s “fair value” rate base prior to approving or, as in this case, extending a hook-up fee tariff.

IV. THE DECISION IS INCONSISTENT WITH STAFF’S RECOMMENDED RESULT IN ANOTHER PENDING COMMISSION DOCKET

Assuming, for sake of argument, that it is appropriate to treat the Company’s hook-up fees as a rate or charge for service that produces additional revenue, as opposed to CIAC (i.e., a contribution of capital), then the Decision conflicts with the position of Staff in a proceeding presently pending before the Commission, *In the Matter of the Application of Arizona Public Service Corporation for Approval of Adjustment Mechanisms*, Docket No. E-01345A-02-0403. Arizona-American asks that the Commission take administrative notice of that proceeding for the limited purpose of reconsidering Staff’s argument on the applicability of *U. S. West II* to hook-up fees and similar charges.

In its pending application, Arizona Public Service (“APS”) is seeking approval of four separate adjuster and surcharge mechanisms based on conditions set forth in a 1999 Settlement Agreement concerning electric restructuring outside a general rate case and without a determination of the utility’s “fair value” rate base. APS had an adjustment clause in some form until 1989, when the Commission abolished it in Decision No. 56450 (April 13, 1989). One of the four adjustment mechanisms sought by APS in the pending docket is a Power Supply Adjustor (“PSA”), that will allow APS to collect additional amounts from customers based on changes in the cost of purchased power. In summarizing Staff’s conclusions and recommendations regarding the establishment of this adjuster mechanism, Staff witness Linda A. Jaress recently testified:

Staff sees no compelling reason to adopt the APS proposed adjuster and surcharge mechanisms at this time. Staff believes that the upcoming APS rate case is a better forum for constructing and implementing the mechanisms when their

1 precise impact on customers can be determined. However,
2 due to the provisions of the Settlement Agreement and after
3 considering the adjustor and surcharge mechanisms' potential
4 impacts, Staff is not opposed to Commission approval of
5 portions of the APS request for adjustor and surcharge
6 mechanisms, subject to certain conditions.

7 Direct Testimony of Linda A. Jaress, February 13, 2003, Docket No. E 01345A-02-403.

8 Notably, none of the 12 conditions proposed by Staff include a requirement that the
9 automatic adjustment mechanism requested by APS be established following a "fair
10 value" determination, as the Decision has required in connection with Arizona-American's
11 application (and as Staff argued in moving to dismiss the application). APS's revenues
12 will increase, affecting the utility's operating income and return on rate base. Yet, no "fair
13 value" determination will be required prior to the implementation of these new charges.

14 If Staff's position in the instant docket were correct as a matter of law, as the
15 Commission has determined, this inconsistency cannot be squared with the 1999 APS
16 Settlement Agreement, which allows that utility to collect additional revenues from its
17 customers outside a general rate case. Arizona-American does not oppose or disagree
18 with Staff's position in the APS proceeding. However, Arizona-American does submit
19 that it should be afforded the same regulatory treatment as APS. Indeed, it is arguably
20 more important to allow smaller water and wastewater utilities to utilize hook-up fees,
21 adjuster mechanisms and similar streamlined approaches to cost recovery to maintain their
22 financial viability.

23 V. CONCLUSION

24 In light of the foregoing, the Decision should be reconsidered. There is simply no
25 legal basis for the Commission to deviate from established Commission precedent in
26 which hook-up fees have been authorized outside of a general rate case and without a "fair
27 value" finding. Clearly, *US West II* provides no support for the Commission's rejection of
28 its previous decisions. Moreover, Staff's position in the pending APS docket adds

1 additional support to the Company's position here. Therefore, Arizona-American urges
2 the Commission to reconsider this matter.

3 RESPECTFULLY SUBMITTED this 24th day of April, 2003.

4 FENNEMORE CRAIG, P.C.

6 By 

7 Norman D. James
8 Jay L. Shapiro
9 Suite 2600
10 3003 North Central Avenue
11 Phoenix, Arizona 85012
12 Attorneys for Arizona-American
13 Water Company, Inc.

11 ORIGINAL and 15 copies of the
12 foregoing hand delivered this 24th
13 day of April, 2003, to:

13 Docket Control
14 Arizona Corporation Commission
15 1200 West Washington Street
16 Phoenix, Arizona 85007

15 COPY of the foregoing hand
16 delivered this 24th day of
17 April, 2003, to:

17 Chairman Marc Spitzer
18 Arizona Corporation Commission
19 1200 W. Washington St.
20 Phoenix, AZ 85007

20 Commissioner William Mundell
21 Arizona Corporation Commission
22 1200 W. Washington St.
23 Phoenix, AZ 85007

22 Commissioner Jim Irvin
23 Arizona Corporation Commission
24 1200 W. Washington St.
25 Phoenix, AZ 85007

25 Commissioner Mike Gleason
26 Arizona Corporation Commission
1200 W. Washington St.
Phoenix, AZ 85007

1 Commissioner Jeff Hatch-Miller
Arizona Corporation Commission
2 1200 W. Washington St.
Phoenix, AZ 85007
3
4 Paul Walker, Aide to Chairman Spitzer
Arizona Corporation Commission
5 1200 W. Washington St.
Phoenix, AZ 85007
6
7 Hercules Dellas, Esq., Aide to Commissioner Mundell
Arizona Corporation Commission
8 1200 W. Washington St.
Phoenix, AZ 85007
9
10 Kevin Barlay, Esq., Aide to Commissioner Irvin
Arizona Corporation Commission
1200 W. Washington St.
Phoenix, AZ 85007
11
12 Dean Miller, Aide to Commissioner Hatch-Miller
Arizona Corporation Commission
1200 W. Washington St.
Phoenix, AZ 85007
13
14 Jodi Jerich, Esq., Aide to Commissioner Gleason
Arizona Corporation Commission
15 1200 W. Washington St.
Phoenix, AZ 85007
16
17 Dwight D. Nodes, Assistant Administrative Law Judge
Hearing Division
Arizona Corporation Commission
18 1200 W. Washington St.
Phoenix, AZ 85007
19
20 Timothy J. Sabo, Attorney
Legal Division
Arizona Corporation Commission
21 1200 W. Washington St.
Phoenix, AZ 85007
22

23
24 By: 

25 1412669.2/73244.047
26

EXHIBIT

A

Responses to Arizona-American's First Set of Data Requests
Dockets 02-0628 and 02-0629
Responses by Timothy J. Sabo

1.1 Staff does not maintain a master list of all hook-up fees, and gathering this information would be burdensome because it would require an examination of all existing tariff pages. However, Staff is willing to stipulate that numerous hook-up fees have been established in the past.

- 1.2 (a) All, or almost all, of the hook-up fees are treated as CIAC.
(b) Some, but not all of the hook-up fees were issued in a rate case or similar proceeding where the Commission made a fair value finding.
(c) N/A

1.3 Staff intends to take no action. Under A.R.S. § 40-252, the existing orders that have authorized hook-up fees remain valid and in-force. Staff filed its Motion to Dismiss in response to the decision of the Arizona Supreme Court in *US West II*. Staff is concerned not with reviewing past actions, but rather what actions are appropriate to take in the future. Staff intends to treat all future hook-up fee applications in the same manner as these cases - it will only recommend approval of a hook-up fee in the context of a rate case (or where there is a fair value finding that is so recent that it can reasonably be used in a hook-up fee order).